

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD LEE FOX,

Defendant-Appellant.

UNPUBLISHED

May 19, 2009

No. 284498

Bay Circuit Court

LC No. 06-010247-FH

Before: Fitzgerald, P.J., and Talbot and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of third-degree fleeing and eluding, MCL 257.602a(3)(a), operating a motor vehicle with a revoked license, MCL 257.904(1)(b), and operating a motor vehicle without insurance, MCL 500.3102.¹ Defendant was sentenced as a third habitual offender, MCL 769.11, to 93 days in jail for the operating without insurance conviction and one year in jail for the remaining two offenses. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant asserts that he was denied his Sixth Amendment right to counsel. Specifically, defendant contends the trial court misconstrued his request for out-of-state counsel as a petition for self-representation. Defendant argues that he did not unequivocally ask to represent himself and lacked the mental capacity to knowingly and intelligently waive counsel. While engaging in a de novo review of the record, we review a trial court's findings regarding whether a defendant's waiver of counsel was knowing and intelligent for clear error, *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004), and the trial court's decision to permit a defendant to represent himself for an abuse of discretion. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003).

While the constitutional right to counsel encompasses the right of a defendant to choose retained counsel, US Const, Am VI; US Const, Am XIV; 1963 Const, art 1, §§ 13 and 20; *United States v Gonzalez-Lopez*, 548 US 140, 144; 126 S Ct 2557; 165 L Ed 2d 409 (2006); *People v Aceval*, 282 Mich App 379, 386-387; ___ NW2d ___ (2009), the appointment of counsel for an

¹ Statutory citations are consistent with judgment of sentence contained in the lower court record.

indigent person is not an entitlement to the appointment of counsel of his choice, *Gonzalez-Lopez*, *supra* at 144; *People v Russell*, 471 Mich 182, 192 n 25; 684 NW2d 745 (2004). Further, although a criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by the Michigan Constitution and statute, Const 1963, art 1, § 13; MCL 763.1, that right is not absolute, *Indiana v Edwards*, ___ US ___; 128 S Ct 2379, 2384; 171 L Ed 2d 345 (2008).

Several requirements exist before a defendant may proceed *in propria persona*. *Russell*, *supra* at 190-191. Initially, a defendant must unequivocally request to represent himself. *Williams*, *supra* at 642; *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007). During voir dire, defendant indicated that he did not need appointed counsel and could speak for himself. After giving defendant time to evaluate his options and determine how he wished to proceed, the trial court inquired if defendant wished to continue with appointed counsel. Defendant clearly and unequivocally indicated his preference to represent himself by stating, “No, I—I want to do it myself.”

The trial court must next ascertain whether defendant’s waiver of counsel is knowing, intelligent, and voluntary. *Williams*, *supra* at 642. Although a defendant's general competence is relevant to the determination his technical knowledge or competence regarding the practice of law is not. *People v Dennany*, 445 Mich 412, 432; 519 NW2d 128 (1994). The court must make the defendant aware of the dangers and disadvantages of self-representation. *Iowa v Tovar*, 541 US 77, 89; 124 S Ct 1379; 158 L Ed 2d 209 (2004); *Williams*, *supra* at 642-643. “A waiver is sufficient if the defendant ‘knows what he is doing and his choice is made with open eyes.’” *Williams*, *supra* at 642 (citations omitted).

The trial court apprised defendant of the dangers and disadvantages of self-representation. Defendant affirmatively responded to the trial court’s inquiry regarding his understanding that he was relinquishing his right to an attorney. The trial court informed defendant that if he engaged in self representation that he would not have the benefit of legal training, which was affirmatively acknowledged by defendant. When asked if he had any questions about the dangers or disadvantages of self-representation, defendant replied that he saw only the advantages. Following the trial court’s delineation of the charges and possible penalties to be incurred upon conviction, defendant acknowledged that he understood this information. When specifically asked by the trial court if he had any questions about the possible penalties, defendant replied that he saw only the rewards.

On appeal, defendant contends that his decision to represent himself could not have been knowing or intelligent because of his mental deficiencies. Defendant was referred and evaluated by the Forensic Center on two separate occasions and was found competent to stand trial. The trial court reviewed the Forensic Center reports, consulted with defendant and apprised him of the dangers and disadvantages of self-representation. Based on the lower court record evidencing repeated and extensive discourse with defendant regarding the risks inherent in self representation, we find that the trial court’s determination that defendant’s waiver of counsel was knowing, intelligent, and voluntary was not clearly erroneous. *Williams*, *supra* at 640.

Further, a trial court must determine that the defendant's self-representation will not disrupt, inconvenience, or burden the court. *Williams*, *supra* at 642. The trial court informed defendant that he would be at risk for removal from the courtroom and counsel would continue

the trial if defendant disrupted the proceedings or disregarded the trial court's orders or procedures. To this, defendant replied, "I'll follow my best."

A trial court must comply with the requirements of MCR 6.005. *Williams, supra* at 642-643. Once a defendant has waived his right to counsel, the record must affirmatively demonstrate at each subsequent proceeding that the court advised the defendant of his continuing right to counsel and that the defendant waived that right. MCR 6.005(E); *People v Lane*, 453 Mich 132, 137; 551 NW2d 382 (1996). The failure to substantially comply with these requirements renders the defendant's waiver of counsel ineffective. *Russell, supra* at 191-192. The lower court record demonstrates that the trial court substantially complied with the requirements of MCR 6.005. Before permitting defendant to waive counsel, the trial court advised defendant of the charges, possible sentences, and risks of self-representation. The trial court also permitted defendant the opportunity to consult with an attorney. MCR 6.005(D); *Russell, supra* at 190-191; *Williams, supra* at 642-643, 646. Although the record does not affirmatively show that the trial court advised defendant of his continuing right to counsel or that defendant waived that right on the second day of trial, we conclude that any error was harmless because appointed counsel remained available in an advisory capacity and defendant has not alleged that this omission resulted in any prejudice. Because the trial court substantially complied with MCR 6.005, and any noncompliance comprised harmless error, all requirements for defendant to engage in self-representation were fulfilled. *Russell, supra* at 191-192; *Williams, supra* at 642.

Finally, the statutory citations provided *supra*, denoting defendant's convictions pertaining to Count I, fleeing and eluding [MCL 257.602a(3)(a)], and Count III, operating a motor vehicle with a revoked license [MCL 257.904(1)(b)], are listed in accordance with the Judgment of Sentence in the lower court record. Although not raised by either party, on its own initiative this Court finds the citations provided in the judgment of sentence are inconsistent with the facts and charges as delineated in the Information contained in the lower court record. Specifically, with regard to Count I, fleeing and eluding, MCL 257.602a(3)(a) requires "[t]he violation results in a collision or accident," which is not consistent with the factual record in this case. In contrast, the Information indicates defendant was charged as attempting to flee and elude an officer "in an area where the speed limit was 35 miles per hour or less" consistent with the language of MCL 257.602a(3)(b). With respect to Count III, operating a vehicle with a revoked license, we note that MCL 257.904(1) does not provide for a subsection (b). The Information for this offense indicates defendant was charged in accordance with MCL 257.904(3)(a), which comprises a "first violation." However, defendant was sentenced in accordance with MCL 257.904(3)(b) "[f]or a violation that occurs after a conviction" and which entails "imprisonment for not more than 1 year or a fine of \$1,000.00, or both." As a result, we remand this matter to the trial court solely for clerical correction of the Judgment of Sentence.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Douglas B. Shapiro